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8 Attorney for: Plaintiff/Cross-defendant

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF SAN DIEGO
11 EL CAJON JUDICIAL DISTRICT

12 CINEMATRONICS, INC.,)
13 a California corporation,)

14 Plaintiff,)

15 v.)

16 VECTORBEAM, a California)
17 corporation; EXIDY INCORPORATED,)
18 a California corporation; and)
19 DOES I through X, inclusive,)

20 Defendants.)

21 EXIDY INCORPORATED, a)
22 California corporation,)

23 Cross-complainant,)

24 v.)

25 CINEMATRONICS, INC.,)
26 a California corporation,)

27 Cross-defendant.)

Case No. 451437

MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT

Date: 3-18-81
Time: 2:30 p.m.
Dept: 6

28 COMES NOW plaintiff and cross-defendant CINEMATRONICS, INC.,
a California corporation, by and through counsel, who respectfully
submit the following memorandum of points and authorities in
support of its motion for partial summary judgment on file herein:

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3 PRELIMINARY STATEMENT

4 The complaint on file herein alleges three (3) causes of
5 action: Default upon a promissory note, liability based upon the
6 guarantee thereof and breach of contract respecting the failure
7 to pay certain royalties.

8 Defendants' answer essentially denies all material allega-
9 tions of plaintiff's complaint and sets forth four (4) affirmative
10 defenses: Failure to state a cause of action, failure of consider-
11 ation, unclean hands and breach by plaintiff relieving defendants
12 of their obligations under the contracts. In addition, defendants
13 incorporate, as an affirmative defense, the allegations of their
14 cross-complaint.

15 Said cross-complaint alleges eight (8) causes of action:
16 Fraud in connection with the sale of stock, negligent misrepres-
17 entation, reformation, damages under California Corporations
18 Code Section 25501, breach of warranty with respect to consent to
19 transfer shares, breach of contract, declaratory relief and in-
20 demnity.

21 Plaintiff and cross-defendant CINEMATRONICS, INC., generally
22 denied the allegations of the unverified cross-complaint.

23 By the instant motion plaintiff/cross-defendant CINEMATRONICS,
24 INC., seeks summary judgment in its favor upon the First Cause
25 of Action (Fraud) of said cross-complaint.

26 STATUTORY AUTHORITY

27 California Code of Civil Procedure Section 437c provides,
28 in pertinent part:

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3 "Any party may move for summary judgment in
4 any action or proceeding if it is contended that
5 the action has no merit or that there is no defense
6 thereto.

7 * * *

8 Such motion shall be granted if all the papers
9 submitted show that there is no triable issue as
10 to any material fact and that the moving party is
11 entitled to a judgment as a matter of law. In
12 determining whether the papers show that there
13 is no triable issue as to any material fact the court
14 shall consider all of the admissible evidence set
15 forth in the papers and all inferences reasonably
16 deducible from such evidence, except summary judgment
17 shall not be granted by the court based on in-
18 ferences reasonably deducible from such evidence,
19 if contradicted by other inferences or evidence,
20 which raise a triable issue as to any material fact.

21 * * *

22 If it appears that the proof supports the granting
23 of such motion as to some but not all . . . the
24 issues involved in the action, or that one or more
25 of the issues raised by a claim is admitted, or
26 that one or more of the issues raised by a defense
27 is conceded, the court shall, by order, specify that
28 such issues are without substantial controversy.
At the trial of the action the issue so specified
shall be deemed established and the action shall
proceed as to the issues remaining.

* * *

Except where a separate judgment may properly
be awarded in the action, no final judgment shall
be entered on a motion for summary judgment prior
to the termination of such action, but the final judgment
in such action shall, in addition to any matters
determined in such action, award judgment as established
by the summary proceeding herein provided for."

ARGUMENT

Reduced to its simplest terms, the First Cause of Action
contained in the cross-complaint of EXIDY, INCORPORATED (hereinafter
"EXIDY") on file herein alleges nine (9) fraudulent repre-

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3 sentations allegedly made by plaintiff/cross-defendant
4 CINEMATRONICS, INC., (hereinafter "CINEMATRONICS") respecting the
5 sale of the corporate stock of VECTORBEAM, a wholly-owned subsidiary of CINEMATRONICS.

7 Those allegedly fraudulent representations are summarized
8 as follows:

- 9 1. That VECTORBEAM's financial statements, etc., fairly
10 represented the financial condition of that company;
- 11 2. That VECTORBEAM was subject to no undisclosed liabilities;
- 12 3. That VECTORBEAM was not a party to any contracts or
13 commitments other than those set forth in EXHIBIT "A" to the
14 cross-complaint;
- 15 4. That said EXHIBIT "A" accurately represented the true
16 agreement of the parties;
- 17 5. That VECTORBEAM's inventory was accurately valued;
- 18 6. That VECTORBEAM's accounts receivable represented only
19 amounts legitimately owed to it;
- 20 7. That VECTORBEAM's accounts payable represented amounts
21 owed by it only for goods and services sold and delivered to it;
- 22 8. That CINEMATRONICS would subordinate the EXIDY note
23 taken in consideration upon the sale of VECTORBEAM; and
- 24 9. That Paragraph 6 of EXHIBIT "A" to the cross-complaint
25 would protect EXIDY from losses due to certain misstated financial
26 information.

27 At the outset it should be noted that in order to charge
28 a corporate defendant with making fraudulent representations, it

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3 is necessary to allege: (1) The name of the person who spoke;
4 (2) The authority of that person to speak; (3) The person to whom
5 the comments were addressed; (4) What specifically was said;
6 and, (5) When it was said. Failure to do so renders such claim
7 defective insofar as it fails to state facts sufficient to con-
8 stitute a cause of action. Mason v. Drug, Inc., 31 Cal. App. 2d
9 697, 703, 88 P. 2d 929 (1939). Despite such illusory pleading
10 as is now before the court, CINEMATRONICS is, nevertheless, prepared
11 to demonstrate that there is no triable issue as to any material
12 fact respecting the alleged fraud and that it is entitled to judg-
13 ment in its favor as a matter of law.

14 In doing so, CINEMATRONICS relies heavily on the deposition
15 of HAROLD RAY KAUFFMAN, President, Chairman of the Board and con-
16 trolling shareholder of EXIDY. See: EXHIBIT "1", Page 5, lines
17 17 - 28; Page 6, lines 1 - 3. Said deposition will hereinafter
18 be cited as "DEPO" at the appropriate page(s) and line(s). Such
19 admissions as are therein contained are entitled to and should
20 receive the kind of deference not normally accorded evidentiary
21 allegations in affidavits. D'Amico v. Board of Medical Examiners,
22 11 Cal. 3d 1, 112 Cal. Rptr. 786 (1974).

23 The thrust of CINEMATRONICS' argument herein is simply this:
24 EXIDY relied on and conducted its own investigations respecting
25 these matters and, therefore, cannot, as a matter of law have
26 reasonably relied on the alleged representations of CINEMATRONICS.
27 Moreover, EXIDY has acknowledged its belief that CINEMATRONICS
28 knew very little about the affairs of VECTORBEAM. In short,

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3 EXIDY has as much information as did CINEMATRONICS concerning these
4 alleged misrepresentations.

5 It is, of course, well-settled that to entitle a person to
6 relief or redress because of a false representation, it is not
7 enough to show that the alleged representation was material, known
8 to be false and made with the intent to deceive, but it must be
9 shown that it actually did mislead and deceive - or, in other
10 words, that the party did rely on the misrepresentation. Maxon-
11 Nowlin Co. v. Norswing, 166 Cal. 509, 511, 137 P. 240 (1913).

12 Accordingly, when a party does not, in fact, rely on the
13 other party's statement of fact or opinion, but instead makes an
14 independent examination that satisfies it, no actionable fraud
15 is shown. Carter v. Seaboard Finance Co., 33 Cal. 2d 564, 570,
16 203 P. 2d 758 (1949). The same rule obtains where the complain-
17 ing party relies on its own judgment, experience and information;
18 Hallidie v. First Federal Trust, 177 Cal. 600, 603 - 604, 171 P.
19 431 (1918) or on the advice of others. Colton v. Stanford, 82
20 Cal. 351, 379, 23 P. 16 (1890).

21 The Declaration of PHILLIP SEYMOUR DeCARO filed with the
22 court May 6, 1980, and attached hereto as EXHIBIT "2", for
23 reference, establishes that EXIDY was given an opportunity to,
24 and did, conduct a thorough examination and inventory of VECTORBEAM's
25 inventory and stock. With respect to the alleged fraudulent
26 representation Paragraph 5, therefore, it is clear that EXIDY
27 relied, or should have relied, on its own inventory calculations
28 performed by its CPA which would, thereby, supercede any repre-

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3 sentations by CINEMATRONICS.

4 Further insight into these matters may be gleaned from the
5 deposition of MR. KAUFFMAN at the pages and lines indicated:

6 [Speaking of the "fire sale" of VECTORBEAM]

7 Q: Could I ask what you mean by the term "fire
8 sale"? 18:28

9 A: Very quick, rush, rush, rush type of sale.
10 Cinematronics year is being ended, and we've
11 got to take action and get rid of Vectorbeam
12 very rapidly, and here's our books and our best
13 guess at the inventory and so forth, take our word
14 for it and its correct. It's a very rapid rush,
15 rush, rush type of thing. It all happened in a
16 period of four or five days, and that's what I call
17 a fire sale. 19:1-7

12 * * *

13 See: Pages 28 - 31 wherein it is disclosed that
14 EXIDY, through MR. KAUFFMAN, believed that CINEMATRONICS
15 didn't know what was going on at VECTORBEAM.

15 * * *

16 [Referring to inventory values]

17 Q: So at this first meeting the sums that they
18 gave you were satisfactory, at that first prelim-
19 inary meeting?

20 A: As a ballpark figure it was obviously satis-
21 factory.

22 Q: Did you have it in your mind to investigate
23 the value of the inventory further at that time?

24 A: Yes. 33:7-12

21 * * *

22 Q: Did Mr. Johnson [EXIDY's CPA] review any books
23 of Vectorbeam prior to the acquisition?

24 A: He looked at some of the corporate books, he
25 looked at the way in which the inventory was taken.
26 45:23-26

25 * * *

26 Q: What did he [Mr. Johnson] do while he was there
27 [VECTORBEAM facility]?

28 A: Performed what is called, I believe, an audit
of what he believed to be their inventory. This audit

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3 would be a spot-check type of audit, not a full
4 audit . . . 47:8-11

5 * * *

6 The elements of fraud, which give rise to the tort action
7 for deceit, are well-settled. Those elements are:

- 8 1. Misrepresentation;
9 2. Knowledge of the falsity thereof;
10 3. Intent to defraud;
11 4. Justifiable reliance; and
12 5. Resulting damage.

13 See: 4 Witkin, Summary of California Law, Torts, Section 446
14 and cases therein.

15 In the instant case, the above-cited portions of MR.
16 KAUFFMAN's deposition clearly negate elements (2) and (4). This,
17 it is submitted, is sufficient insofar as to meet its burden,
18 CINEMATRONICS need martial only sufficient evidence to disprove
19 at least one material allegation of the cause of action. Universal
20 Escso Corp., 217 Cal. App. 2d 147 (1969; Fuller v. Goodyear Tire
21 & Rubber, 7 Cal. App. 3d 690 (1970).

22 CONCLUSION

23 It has been demonstrated that FXIDY's own belief was that
24 CINEMATRONICS and, thus its principals, knew very little of the
25 internal affairs of VECTORBEAM. Accordingly, they have admitted
26 that CINEMATRONICS did not have the required knowledge of the
27 falsity of the alleged representations. At the very least,
28 it is submitted, such a showing fully negates defendant/cross-

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3 complainant's prayer for punitive damages.

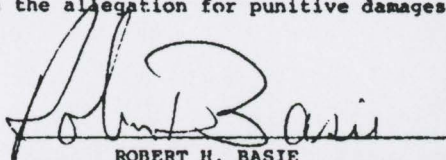
4 Moreover, it is submitted, there can have been no justifi-
5 able reliance on the alleged representations insofar as EXIDY
6 was given the opportunity to, and did, conduct their own inde-
7 pendent investigation. Moreover, it is argued, bare reliance
8 upon such admittedly hastily made and qualified alleged represen-
9 tations in the 1/2 million dollar sale of a business is not
10 reasonable reliance.

11

12 WHEREFORE, based on the foregoing, plaintiff/cross-defendant
13 prays this court grant its motion for partial summary judgment
14 on the First Cause of Action of the cross-complaint on file herein
15 or, in the alternative, upon the allegation for punitive damages
16 contained therein.

17

18 DATED: March 5, 1981



ROBERT H. BASIE

Attorney for Plaintiff/Cross-defendant

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1 or the jury should this matter come to trial; therefore, it
2 would behoove you, again, to give the best and most complete
3 answer here today.

4 If during the course of this deposition you wish to take
5 a break, you wish to consult with your legal counsel, you wish
6 to consult with any legal documents which you brought with you,
7 you certainly have the right to do so. Please so indicate to
8 me, and we'll take that break, or whatever you wish to do. Do
9 you understand that?

10 A. Yes.

11 Q. Have you taken any drugs or alcohol within the past
12 twelve hours?

13 A. No.

14 Q. Do you know of any reason, either physical or mental,
15 why your deposition cannot be taken at this time?

16 A. No.

17 Q. Mr. Kauffman, what's your relationship to Exidy,
18 Incorporated?

19 A. President.

20 Q. Do you hold any other positions with Exidy?

21 A. No.

22 Q. Are you a shareholder of Exidy Corporation?

23 A. Yes.

24 Q. How many shares do you own?

25 A. 20,000.

26 Q. What percentage of the total --

27 MS. CAREY: Could you explain the relevancy of that to
28 this action?

EXHIBIT "I"

1 MR. BASIE: I just want to see if he is a major
2 controlling shareholder of Exidy.

3 THE WITNESS: A. Yea, I am.

4 MR. BASIE: Q. Thank you.

5 You're on the board of directors?

6 THE WITNESS: A. Yea.

7 Q. What position do you hold?

8 A. Chairman of the Board.

9 Q. How many other directors are there in the corporation?

10 A. Three.

11 Q. Would you tell me who they are?

12 A. Howell Ivy and Robert J. Newson. We have an
13 assistant secretary-treasurer named Leslie Hauser.

14 Q. Would you spell Robert J. Newson?

15 A. N-e-w-s-o-n.

16 Q. Okay. So the board of directors then consists of
17 Mr. Ivy, Mr. Newson and you?

18 A. Right.

19 Q. Would you tell me who are the other officers of
20 Exidy Corporation in addition to yourself?

21 A. Howell Ivy, vice president; Leslie Hauser, vice
22 president.

23 Q. Do you have a chief financial officer?

24 A. That's it.

25 Q. Do you have a secretary-treasurer?

26 A. Robert J. Newson, non-working. He's not employed at
27 Exidy per se.

28 Q. But he is the secretary-treasurer of Exidy.

1 Vectorbeam?

2 A. I don't recall if he told me that or not.

3 Q. Okay. When did Mr. DeCaro tell you that he was an
4 officer of Vectorbeam?

5 A. At the time of acquisition.

6 Q. You have indicated in your complaint on Page 1 that
7 during the course of the acquisition of Vectorbeam, that
8 Cinematronics and Vectorbeam was represented by Mr. DeCaro, is
9 that correct?

10 A. Yes.

11 Q. What did you believe at that time to be Mr. DeCaro's
12 function during the course of these negotiations?

13 A. As an officer and shareholder of Vectorbeam.

14 Q. Did he fulfill any other role?

15 A. Legal counsel for the fire sale of the Vectorbeam
16 facility.

17 Q. Therefore, during the course of these negotiations
18 you were aware that Mr. DeCaro was an attorney or is an attorney?

19 A. Yes.

20 Q. When did you first meet Mr. DeCaro?

21 A. Maybe a month or two before the Vectorbeam
22 acquisition.

23 Q. Was Mr. DeCaro approached by you, or were you
24 approached by Mr. DeCaro regarding the subject?

25 A. I was approached by Mr. DeCaro.

26 Q. Do you recall when that was?

27 A. Well, it was directly prior to the fire sale.

28 Q. Could I ask what you mean by the term "fire sale"?

1 A. Very quick, rush, rush, rush type of sale.
2 Cinematronics' year is being ended, and we've got to take
3 action and get rid of Vectorbeam very rapidly, and here's our
4 books and our best guess at the inventory and so forth, take
5 our word for it, and it's correct. It was a very rapid rush,
6 rush type of thing. It all happened in a period of four or
7 five days, and that's what I call a fire sale.

8 Q. Returning back to the time when you indicated you
9 first met Mr. DeCaro, was the subject of the acquisition of
10 Vectorbeam discussed?

11 A. No.

12 Q. Were the subjects discussed having anything to do
13 with the potential acquisition of Vectorbeam?

14 A. No.

15 Q. When was it that you first discussed the acquisition
16 of Vectorbeam with Mr. DeCaro or any other representative of
17 Vectorbeam?

18 A. Oh, approximately the first week in December.

19 Q. Who was that with?

20 A. That was with Gil Lavine, DeCaro, Pierce and Tom
21 Stroud, Jr.

22 Q. This was the very first time you were approached
23 regarding the acquisition of Vectorbeam?

24 A. Yes.

25 Q. Had you considered it prior to this time?

26 A. No, I did not know about it before this time.

27 Q. Were you aware of the existence of Vectorbeam
28 Corporation before this time?

1 A. The inventory was discussed in a -- well, "How much
2 inventory approximately do you think you have at the Vectorbeam
3 facility?"

4 Q. And this question was at the first meeting?

5 A. Yeah. Not specifically items of inventory, but
6 "How much is your bulk inventory estimated at?"

7 Q. Kind of a general question then?

8 A. General.

9 Q. Did that come from you?

10 A. I believe so.

11 Q. Were you given an answer to that question?

12 A. It was represented in a dollar figure by someone
13 knowledgeable at the meeting. I don't recall the figure.

14 Q. I'm sorry. I didn't mean to interrupt you.
15 You don't recall the figure?

16 A. I don't recall the monetary figure at this time.

17 Q. Would you have taken any notes or anything like that
18 at that first meeting which would reflect this monetary sum?

19 A. Not to my knowledge.

20 Q. Do you recall who gave you that answer?

21 A. It could have possibly been Levine or DeCaro.

22 Q. Now, at this first meeting was it your understanding
23 -- strike that question.

24 At this first meeting what was your understanding of Mr.
25 Pierce's physical connection with Vectorbeam?

26 A. My understanding was that he, being president of
27 Cinematronics, owned the Vectorbeam facility.

28 Q. Do you know whether or not Mr. Pierce's office was

1 at the Vectorbeam facility or was it elsewhere?

2 A. No. Pierce's office was in Cinematronics to my
3 knowledge.

4 Q. And you know where the Cinematronics offices are?

5 A. Yes.

6 Q. Where?

7 A. El Cajon, California.

8 Q. Do you know whether or not Mr. Pierce ever came up
9 to inspect or visit Vectorbeam?

10 A. I don't know for sure, but I would imagine he did
11 as he owned it, but I don't think he knew what was going on at
12 the Vectorbeam facility if that's what you're getting at.

13 Q. That's what I'm getting at.

14 A. I think his knowledge was very minimal of what was
15 really happening at the Vectorbeam facility, including
16 Cinematronics' group per se did not know to the best of my
17 knowledge what the hell was going on there. Otherwise they
18 wouldn't have been in a position that they were in.

19 Q. Was this your state of mind, if you can recall it,
20 at this first meeting; in other words, was this your belief?

21 A. It was not my belief during the initial introduction.
22 I didn't have this belief until I had the opportunity to dig
23 into some of the bookwork and inventories, and I thought to
24 myself that no one in business could possibly let a wholly
25 owned facility get so far out of hand without taking some action.

26 Q. Do you recall when you first entertained this
27 belief?

28 A. Well, this is a buildup over time, with the

1 surprises that were coming into Exidy on a weekly or monthly
2 basis of some of the commitments that they had made to people,
3 vendors, distributors. This would be almost mostly a surprise
4 that some of the stuff -- I don't think Pierce knew what was
5 going on, and it was way out of hand.

6 Q. Okay. Getting back to my original question, and I
7 know it may be difficult, can you set a time when you first
8 began entertaining this belief, and maybe we can refer to the
9 date of acquisition?

10 A. Well, I think I started thinking something was
11 wrong probably the first week in January. Everything was not
12 as stated in their inventory, and some of the accounts
13 receivable, some of their commitments to outside vendors and
14 so forth, and as recently as last week I've gotten a surprise.

15 MS. CAREY: Could we go off the record?

16 THE WITNESS: A. But that was only \$107.

17 (Whereupon, at this time there is a discussion off the
18 record)

19 MR. BASIE: Q. Back on the record now.

20 Going back to your first meeting in your office, Mr.
21 Kauffman, what was your belief as to Mr. Pierce's familiarity
22 with the day-to-day operations of Vectorbeam Corporation?

23 THE WITNESS: A. Being the president of Cinematronics
24 and owning another company, I believed him to be aware of
25 everything that was going on in both his own company and the
26 Vectorbeam facility.

27 Q. Even the day-to-day operations of it?

28 A. I believed them to be aware of what was going on.

1 Q. Did he ever tell you during this first meeting or
2 any other time that he visited Vectorbeam on a regular basis
3 or spent a great deal of time there or any statements in that
4 regard?

5 A. No.

6 Q. Did you have any particular facts which would lead
7 you to believe that he spent a great deal of time at Vector-
8 beam?

9 A. No.

10 Q. Now about Mr. Stroud, and I'm essentially looking
11 for the same information with Mr. Stroud?

12 A. Which Mr. Stroud? .

13 Q. I'm sorry. Mr. Stroud, Jr.

14 When I say "Mr. Stroud," I'm talking about Mr. Stroud, Jr.,
15 right now.

16 A. That's Papa Tom? .

17 Q. Yes, sir. .

18 A. No. .

19 Q. By now you mean you had no particular belief
20 regarding his knowledge of the day-to-day operations?

21 A. No. .

22 Q. At that first meeting did you have any belief as to
23 who would be the most informed of the people in front of you
24 regarding the day-to-day operations of Vectorbeam?

25 A. Those persons to the best of my belief would be all
26 present having equal knowledge.

27 Q. So you were under the impression that all had
28 equal knowledge as to the day-to-day operations; is that

1 A. Not at the first meeting.

2 Q. Did you inquire on your own to these gentlemen
3 present at the first meeting as to any valuation of the
4 inventory; in other words, when they gave you these figures,
5 did you press them further?

6 A. No. I just wanted a rough amount at the time.

7 Q. So at this first meeting the sums that they gave
8 you were satisfactory, at that first preliminary meeting?

9 A. As a ballpark figure, it was obviously satisfactory.

10 Q. Did you have it in your mind to investigate the
11 value of the inventory further at that time?

12 A. Yes.

13 Q. Had you formulated any specific plans?

14 A. No.

15 Q. Did you have any idea at that time how you wanted
16 to verify the inventory valuation?

17 A. Not at the first meeting.

18 Q. Let me back up for a few minutes, if I may, Mr.
19 Kauffman.

20 You indicated you had met Mr. DeCaro, I believe, several
21 times before this first meeting?

22 A. Once, maybe twice before.

23 Q. Okay.. Was that meeting associated in any way with
24 Vectorbeam or its potential acquisition or anything along those
25 lines?

26 A. There was a statement at one of our meetings that
27 we were in similar businesses, specifically, the games
28 industry, and that he was involved in the Vectorbeam games

1 didn't feel it necessary due to the time constraint to have
2 legal counsel on our behalf.

3 Q. Did you ever attempt to contact legal counsel?

4 A. No.

5 Q. Were you ever specifically told that a lawyer was
6 not necessary?

7 A. No, I wasn't told one way or the other.

8 Q. Did you ever ask anybody from the Cinematronics
9 group for a delay in time to give you time to contact a lawyer?

10 A. No.

11 Q. Was there any reason that you know of that you were
12 prevented from seeking legal counsel aside from the facts
13 you've already mentioned?

14 A. No.

15 Q. Did Mr. Johnson advise you to acquire Vectorbeam, or
16 did he advise against the acquisition of Vectorbeam?

17 MS. CARRY: I --

18 THE WITNESS: A. He didn't have an opinion one way
19 or another.

20 MR. BASIE: Q. Did Mr. Johnson take part in the
21 acquisition?

22 THE WITNESS: A. No.

23 Q. Did Mr. Johnson review any books of Vectorbeam prior
24 to the acquisition?

25 A. He looked at some of the corporate books, he looked
26 at the way in which inventory was taken.

27 Q. This was all prior to --

28 A. Prior to the final signing of the papers.

1 A. Yes.

2 Q. Do you recall how many times?

3 A. Once.

4 Q. Do you recall when that was?

5 A. Saturday.

6 Q. Do you recall how long he was there?

7 A. Two to three hours.

8 Q. What did he do while he was there?

9 A. Performed what is called, I believe, an audit of
10 what he believed to be their inventory. This audit would be a
11 spot-check type of audit, not a full audit, on books or
12 inventory. More or less a spot-check on their people's
13 account of material parts in the inventory as stated by the
14 Vectorbeam group.

15 Q. Okay. This you say was on Saturday?

16 A. Yes.

17 Q. Okay. Let me back up a little bit, if I may,
18 please.

19 In that first meeting that you had with the Cinematronics
20 group in your office, do you recall what day that was, date or
21 day of week?

22 A. That was a couple of days before the Saturday. In
23 fact, Gary Johnson was at the inventory meeting.

24 Q. But at this first meeting you indicated that was
25 just a few days before the Saturday meeting?

26 A. Yes.

27 Q. Could have been a Wednesday or Thursday?

28 A. Yes. I don't recall. I would guess Tuesday.

1 Robert Basie, Esq.
2 1200 3rd Street, Suite 1200
3 San Diego, California 92101

4 Attorneys for Plaintiff

FILED
NOTED
MAY 6 1980

U.S. District Court
San Diego, California

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

11 CINEMATRONICS, INC., a California
12 corporation,

13 Plaintiff,

14 vs.

15 VECTORBEAM, a California corporation,
16 EXIDY, INC., a California corporation,
17 and DOES I through X, inclusive,

18 Defendants.

No. 451437

DECLARATION OF

PHILLIP SEYMOUR DeCARO

19 I, PHILLIP SEYMOUR DeCARO, declare as follows:

20 1. I am an attorney at law, licensed to practice in
21 the state of California.

22 2. On Friday, November 30, 1979, I was negotiating with
23 Exidy for the purchase of Vectorbeam from Cinematronics. Exidy
24 was represented in those negotiations by H. R. "Pete" Kauffman,
25 Howell Ivy and Leslie Hauser. I was the principal seller's
26 negotiator and I was in daily contact with Exidy.

27 3. During these negotiations, on that particular Friday,
28 at Exidy, in Sunnyvale, in order to speed up the purchase, I
requested Exidy verify the physical inventory then being taken

EXHIBIT "2"

1 by Vectorbeam.

2 4. Mr. Kauffman had been told on both the preceeding
3 Wednesday and Thursday that Vectorbeam was taking the regular
4 month-end physical inventory on Friday. He was invited to have
5 his people join in that inventory taking any way he wanted on
6 Friday. He told me he had not been able to contact his accountant
7 to make the necessary arrangements. I pressed him to make
8 those arrangements.

9 5. On Friday afternoon, after being in negotiations 2-
10 3 hours, at my urging, Mr. Kauffman directed his staff to assemble
11 a team to take a physical inventory the next day--Saturday--at
12 Vectorbeam. Vectorbeam is approximately 15 miles or 30 minutes
13 from Exidy.

14 6. On Saturday morning, beginning approximately 10:00
15 a.m., at Vectorbeam, at least five Exidy employees and also its
16 certified public accountant, Mr. Gary Johnson, took a sample
17 physical inventory.

18 7. The Exidy employees, in addition to its CPA, actually
19 taking this physical inventory were:

20 (a) H. R. "Pete" Kauffman, President;

21 (b) Howell Ivy, Vice-President and Director of Engin-
22 eering;

23 (c) Leslie Hauser, Vice President; and

24 (d) At least two other additional Exidy employees,
25 one of whom was, I believe, Mike Cooper-Hart.

26 8. Assisting Exidy were the following Vectorbeam employees:

27 (a) Gilbert J. Levine, General Manager;

28 (b) Carol L. Hatton, Controller;

1 (c) Loren Greenwich, Vice President in charge of
2 Manufacturing;

3 (d) Edward Anderson, In Charge of all Production;

4 (e) Joanne Anderson, Sales, Administration and
5 Customer Service;

6 (f) Tony Bartholomew, Production Line Supervisor; and

7 (g) Don Wright.

8 Messrs. Greenwich, Anderson and Bartholomew and Mrs. Anderson
9 were, as of early April, still Vectorbeam/Exidy employees.

10 9. That at the time of this physical inventory by Exidy,
11 Vectorbeam's employees gave Exidy personnel complete access to
12 all areas of the Vectorbeam facility. The taking of this inventory
13 was done by Exidy personnel under the direction of Exidy's CPA
14 and its chief officers.

15 10. Exidy's personnel counted all games on the assembly
16 line, all games in finished goods, all monitors in burn in, all
17 monitors in test and numerous other component parts. Mr. Johnson,
18 CPA, directed physical counting of various electronic components.
19 Finished goods in an adjoining bonded warehouse were counted.

20 11. Exidy was given copies of the inventory reports made
21 by Vectorbeam on the preceeding day and had these to compare
22 with the counting they were doing. The physical count by Exidy's
23 personnel on Saturday never materially varied from the in house
24 Vectorbeam inventory reports.

25 12. No time limit was imposed on Exidy's personnel taking
26 this inventory and they took approximately four hours. They completed
27 and left when they wanted to--not before. At the time of leaving
28 Vectorbeam, I personally asked Mr Johnson, CPA, Mr. Kauffman and

1 Ms. Hauser if they needed anything else from Vectorbeam--the
2 answer was "No." During the later part of the actual taking
3 of this physical inventory, Messrs. Kauffman and Ivy met with
4 Messrs. Levine and Grenich in my presence to discuss the critical
5 components needed for future Vectorbeam production and the critical
6 cash flow requirements of Vectorbeam. Certain components, such
7 as power supplies, were discussed in detail including going over
8 the electronic specifications of the power supply and Mr. Ivy
9 sketching out a possible design that could be built "in house".

10 13. At no time thereafter, including the actual signing
11 of the purchase and sale documentation, did anyone at Exidy:

12 (a) Claim or question anything to me about the inven-
13 tory; or

14 (b) Ask me to check or see anything in inventory
15 or any other aspect of Vectorbeam.

16 14. Any claim now made that anyone at Vectorbeam on that
17 Saturday, December 1st, 1979, or at any time thereafter, denied
18 anyone at Exidy access to the inventory or records is totally
19 untrue.

20 If called to testify, I can competantly testify to the
21 above facts of my own knowledge.

22 I declare under penalty of perjury that the foregoing
23 is true and correct. Executed this 6th day of May, 1980, at
24 Portola Valley, California.

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26 PHILIP SEYMOUR DeCARO
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